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No. 88-469

In the Supreme Court of the United States

October Term, 1988

WILLIAM B. RICHARDSON,
Petitioner,

v.

THE PEOPLES NATURAL GAS COMPANY, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PEOPLES NATURAL GAS COMPANY AND GERALD A. WILSON IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE CASE

This action and related proceedings before the Pennsylvania Public Utility Commission ("PUC") and the Commonwealth of Pennsylvania had their origin in a notice from appellee, The Peoples Natural Gas Company ("Peoples"), to Petitioner William B. Richardson advising Richardson that Peoples intended, at its expense, to test the gas meter located in Richardson's residence.[1] Apparently fearing that a test of the meter would reveal a defective service line and, further, prompt a request by Peoples that the meter be relocated to the exterior of his residence, Richardson filed a complaint with the PUC[2] seeking an order directing Peoples to refrain from requesting a relocation of the gas meter.

Following hearings before the PUC, an order was entered directing Richardson to permit Peoples access to the meter for purposes of conducting the required tests and, if necessary, installing a remote reading device on the meter and directing Peoples to adhere to Peoples' customary standards in determining whether or not to demand relocation of the meter (Appendix, pp. A—2-3).[3]

Richardson appealed to the Commonwealth Court of Pennsylvania June 28, 1985.

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[1]Periodic testing, and if necessary, replacement of obsolescent meters, is mandated by statute. 52 Pa. Code §59.21 (Appendix, p. A-1). In conjunction with the testing of the meter, the property owner's service line to the meter is also tested in order to assure that the line is capable of transmitting natural gas safely. In the event the service line leaks or is otherwise defective, the customer must replace the line before service may be restored. The meter is the property of the gas company; the service line belongs to the property owner.

[2]*Richardson v. The Peoples Natural Gas Company*, No. Z-8470299.

[3]*See* 52 Pa. Code. §59.18 (Appendix, p. A-1)

Upon Richardson's failure to respond to a motion to dismiss filed by the PUC, the Commonwealth Court dismissed Richardson's appeal March 21, 1986. In response, Richardson filed a petition in the Commonwealth Court that was treated by that court as a motion for reconsideration. In that motion Richardson complained of the conduct of the PUC proceedings and included, by reference, the allegations of the instant complaint which plaintiff filed in the lower court November 4, 1985.

The Commonwealth Court denied reconsideration in an order dated April 11, 1986. No appeal was taken from the order of the Commonwealth Court.

As a result of the filing of the complaint in the district court and the pendency of the related appeals, and despite the determination in the administrative proceedings that Peoples' conduct was appropriate and in accordance with law, no further action had been taken by Peoples to enter Richardson's residence for the purpose of testing, and if necessary, replacing the gas meter. No alterations of any kind have been made by any party either to the gas meter or service line.

Following service of the complaint in the district court, all defendants filed motions to dismiss. The motion filed on behalf of Peoples and Gerald Wilson, a Peoples employee, requested a dismissal of the complaint pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, averring, *inter alia*, that the complaint failed to allege a cause of action upon which relief can be granted.

Following four status conferences before the district court, the district court entered an order on September 29, 1987 dismissing the complaint. Richardson took an appeal

to the United States Court of Appeals for the Third Circuit.

Upon the filing of Richardson's appeal, Peoples moved for counsel fees and costs pursuant to 28 U.S.C. §1912 and Rule 38 of the Federal Rules of Appellate Procedure. The court of appeals entered an order on May 19, 1988 affirming the order of the district court and awarding Peoples $150 as counsel fees based on the frivolous nature of the appeal. Richardson filed a petition for rehearing in the court of appeals which was denied in an order dated July 1, 1988.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari presents no basis for the exercise of this Court's discretion to review this matter. None of the elements enumerated in Rule 17 of the Rules of the Supreme Court are involved in this matter nor asserted by petitioner. This case does not involve a substantial question of general importance. Instead, this matter simply involves a property owner unhappy at the prospect that a test of his gas service line, done in conjunction with a statutorily-mandated gas meter inspection, may reveal defects in the line, necessitating repair.

Richardson's complaint was properly dismissed pursuant to Rule 12 of the Federal Rules of Civil Procedure for a variety of reasons. Richardson initially prosecuted this action in state administrative proceedings and, on appeal, to the Commonwealth Court of Pennsylvania. Those state proceedings terminated in judgments adverse to Richardson. Richardson did not appeal to the Pennsylvania Supreme Court. Richardson's complaint improperly seeks to invoke the jurisdiction of a federal district court to review state court decisions and, as such, was properly dismissed. Furthermore, the complaint is purely speculative and seeks to recover monetary damages for a purely hypothetical or prospective "injury" and otherwise fails to state a claim upon which relief may be granted by inappropriately relying upon statutes intended to combat racial or class discrimination.

The complaint was also properly dismissed since the complaint seeks to litigate issues and claims asserted by Richardson before the Pennsylvania Public Utility Commission and the Commonwealth Court of Pennsylvania. The state proceedings terminated in final judgments adverse to Richardson and, consistent with theories of

judicial economy, *res judicata* and collateral estoppel, Richardson may not seek to relitigate the same issues and claims in federal court.

ARGUMENT

I. THE PETITION FOR WRIT OF CERTIORARI PRESENTS NO SPECIAL OR IMPORTANT REASONS FOR THE EXERCISE OF THIS COURT'S DISCRETION TO REVIEW THIS MATTER

The Petition for Writ of Certiorari does not present issues of special or general importance beyond the interests of the parties to this action. The Petition cites no lack of uniformity or conflict among the courts of appeal or any departure from the usual course of judicial proceedings. This action was dismissed following the filing of motions to dismiss pursuant to Rule 12 of the Federal Rules of Civil Procedure. As discussed more fully below, the dismissal of this action pursuant to Rule 12 was entirely appropriate. Reduced to its essence, this matter involves merely a utility customer unhappy at the prospect that a test and/or replacement of the utility's meter may reveal defects in the customer's service line that may make repairs or alteration to the line by the customer necessary for the continuation of service.

As made unequivocally clear by Richardson's "Motion In Opposition to Dismissal," filed both in the Commonwealth Court of Pennsylvania and in the lower court, Richardson asserted the identical "overriding . . . constitutional precepts" (Appendix, p. A-5) in both the state administrative and state court appellate proceedings as in this action. In addition, the identity of issues presented in the state proceeding to those in the present action warrants dismissal on the basis of the doctrines of *res judicata* and collateral estoppel. The complaint filed in

the lower court is merely an attempt to invoke the jurisdiction of the district court in review of state court proceedings. Richardson did not proceed with further appeals in the state courts, choosing instead to initiate an action in federal court. It is axiomatic that if the constitutional claims presented in an action in federal district court are "inextricably entwined" with a state court's prior denial of those same constitutional claims, the district court lacks jurisdiction to review the state court decision. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482-84, n. 16 (1983). Merely casting the complaint in the form of a civil rights action is insufficient to overcome the lack of jurisdiction in the district court to entertain matters disposed of in prior state court proceedings. *Hagerty v. Succession of Clement*, 749 F.2d 217, 220 (5th Cir. 1984).

The complaint seeking a review in the lower court of decisions in state proceedings adverse to Richardson was properly dismissed.

II. THE COMPLAINT WAS PROPERLY DISMISSED ON THE BASIS OF FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

A. Richardson Has Not Suffered Any Loss for Which Damages Are Recoverable at Law

The complaint was properly dismissed pursuant to Rule 12(b)(6) for failure to state a cause of action upon which relief can be granted for the simple fact that Richardson has not suffered any loss, economic or otherwise. While the complaint alleges that the various defendants "conspired to manipulate a situation whereby the plaintiff must, at his expense, make alterations in the service line," the complaint is devoid of any allegation that Richardson

has in fact incurred any injury whatsoever. The complaint appears to address, as to appellees Wilson and Peoples, purely anticipated, prospective or hypothetical injury. Richardson seeks monetary damages to redress an "injury" that has not occurred. Clearly, the complaint is speculative and premature.

Richardson is apparently contending that, since he is alleging a violation of constitutional rights, he is entitled to a recovery of monetary damages in the event he should prevail in his claim (Petition, p.7). If so, Richardson's contention has been rejected by this Court in *Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986), wherein this Court held that when parties seek damages for violation of constitutional rights, "the level of damages is ordinarily determined according to principles derived from the common law of torts." *Id.* at 306. Since damages in tort cases are intended to serve as compensation for injury actually incurred, a plaintiff is not entitled to "damages" based wholly on the "abstract value of a constitutional right." *Id.* at 307.

B. The Complaint Does Not State a Cause of Action for Which Relief Can be Granted Pursuant to 42 U.S.C. §1985

Richardson contends, in part, that federal court subject matter jurisdiction is appropriate pursuant to "28 USCS sect. 1343(1)(2)(3)" (Appendix, p. A-10).[4] Richardson's reliance on 28 U.S.C. §1343, and by necessary extension, upon 42 U.S.C. §1985, is misplaced. Section 1985 is intended only to redress injury caused by class or racially based discrimination. *See Griffin v. Breckenridge*, 403 U.S.

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[4]Presumably Richardson intended to invoke 28 U.S.C. §§1343(a)(1), 1343(a)(2) and 1343(a)(3).

88, 102 (1971). The complaint contains no allegation that Richardson was discriminated against because of class-based or racially discriminatory animus, nor do any facts appear from the complaint from which the court could reasonably infer conspiratorial acts motivated by such animus.

If Richardson seeks to invoke the provisions of §1985(3) and 42 U.S.C. §1343(a)(3) in his conclusory allegations of a conspiracy to deprive Richardson of a variety of constitutional protections with the aim of causing Richardson to incur expense in the alteration of his gas service line (Appendix, p. 60), such reliance is misplaced.[5] Section 1985 was enacted in order to combat the prevalent animus against Blacks and their supporters in the struggle to achieve civil rights following the Civil War. *United Brotherhood of Carpenters v. Scott,*, 463 U.S. 825, 836 (1983). In order to make out a cause of action under §1985(3), the plaintiff must allege a racial or other class-based invidious, discriminatory animus underlying the conspirators' action. *Id.* at 835. The complaint alleges no racial or political motive underlying the defendant's "conspiracy" and may be liberally read only to allege merely an economic "conspiracy." Conspiracies motivated by an economic animus were held by this court in *Scott* to be outside the purview of §1985(3).[6] *Id.* at 837. As such, no cause of action is stated pursuant to 1985(3) and dismissal of any claim based on that statute is appropriate.

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[5]28 U.S.C. §1985(3) provides for the recovery of damages incurred as a result of a conspiracy to deprive a person of the equal protection of the laws.

CONCLUSION

For the foregoing premises, the Petition for Writ of Certiorari should be denied.

APPENDIX

52 Pa. Code.

§59.18 Location of meters.

Meters shall be installed in either of the following locations:

1. Inside the building, preferably in a dry, well-ventilated place not subject to excessive heat, and as near as possible to the point of entrance of the pipe supplying service to the building.

2. Outside the building at a location selected by the utility. A meter cover or housing is required if, in the judgment of the utility, conditions require the physical protection for the meter installation.

§59.21 Meter tests.

a. Test schedule for other than Class A, B and C meters. Each public utility shall make and record tests of orifice, rotary displacement and turbine type service meters as follows:

* * *

2. Rotary displacement meters shall be tested and calibrated at the factory in accordance with recognized and accepted practices and shall be correct to within 1.0% when passing gas at their rated capacities. A record of the test shall be made available to and retained by the utility for the life of the meter. At least once every 10 years a differential-rate test shall be made and the results checked against the original test recorded at the time of installation. At least every two years the meter shall be inspected to observe the condition of the meter bearings—noise, vibration, and the like—and the level and condition of the oil in

the reservoirs. An observed problem shall be promptly corrected. A record of the results of these two-year tests shall be maintained by the utility for a period of ten years. In lieu of a differential-rate test, a test method approved by the Commission may be used.

ORDER

IT IS HEREBY ORDERED for the reasons stated in the accompanying discussion:

1. That The Peoples Natural Gas Company shall promptly contact Mr. William B. Richardson by letter advising him of the person's name and telephone number for him to contact in order to schedule a pressure test of his gas line and a meter change.

2. That Mr. William B. Richardson shall contact, and reasonably cooperate with, the personnel of The Peoples Natural Gas Company who are responsible for scheduling pressure tests and the changing of meters.

3. That Mr. William B. Richardson shall permit personnel of The Peoples Natural Gas Company to enter his residence at a mutually convenient time for the purposes of testing the gas line between the gas meter and the curb valve and of changing his gas meter, and, if indicated, consistent with Paragraph 4 of this Order, installing a remote reading device on his gas meter.

4. That the personnel of The Peoples Natural Gas Company shall apply its usual practices, procedures, and guidelines in assessing Mr. Richardson's circumstances and in determining the location for the gas meter for Mr. Richardson's residence.

5. That his Order shall not preclude The Peoples Natural Gas Company from using any remedy provided by law or regulation in order to apply, in Mr. Richardson's circumstances, the service practices it uses in the usual course of its business.

February 5, 1985

/s/ James D. Porterfield

JAMES D. PORTERFIELD
Administrative Law Judge

IN THE

Commonwealth Court of Pennsylvania
Sitting in Harrisburg

WILLIAM B. RICHARDSON,
Petitioner
vs
PENNSYLVANIA UTILITY COMMISSION

No. 1757 CD 1985

MOTION IN OPPOSITION TO DISMISSAL

AND NOW comes the petitioner, William B. Richardson, and moves for cancellation of the order of the Commonwealth Court of March 21st, 1986 (attached), and hereby presents his answer to the Motion to Dismiss filed by the respondent, the Pennsylvania Public Utility Commission (PUC), based on the Rules of Appellate Procedure prescribing time limitations for the filing of briefs with this honorable Court.

1. The petitioner for several months now has not prepared a brief in support of his petition. He will not prepare such a brief at this time because there is first a matter of putting false evidence in proper perspective. Until such is done, the petitioner cannot proceed to base his arguments on evidence accepted by the PUC when he believes The Peoples Natural Gas Company's (PNG's) only witness was discredited. The Administrative Law Judge (ALJ) believed this witness was credible.

2. Examples of incredibility: the transcript shows that the witness read into evidence a letter he had written to the petitioner and this letter was read with every intention that

it was the witness' testimony: He said: "Our servicemen have made several attempts to change your gas meter but found no one home on each occasion." This statement is false. This statement appears at page 21 of the transcript, lines 14 through 16. He was not questioned about this until page 41 (L. 21) where the ALJ asked the witness if he could testify whether he made any attempts to change the meter other than the two letters he read into the evidence. It then became clear that the witness had never sent anyone and that he had no personal knowledge of anyone ever failing to gain entrance at the petitioner's house. See page 42 which is taken up entirely by the witness in explaining the letter and ending up top of page 42 with "—historically we can't get ahold of these people anyway, so I would say, no, I did not—." The foregoing is not the only false statement in this case.

3. The over-riding of constitutional precepts by the PUC projects a picture of the same thing happening again at a bench hearing. The petitioner has filed in Federal Court and has asked for a jury where, hopefully, he will receive more honest treatment. A copy of the federal complaint is attached. The petitioner believes the Commonwealth Court should require an answer or response to each paragraph of this Motion and *review the record with whatever follow-up action it deems appropriate.*

ARGUMENT IN SUPPORT OF RECOMMENDED ACTION

4. Article 5 Section 10 para. (c) of the Pennsylvania Constitution delegates power to the Supreme Court of Pennsylvania to make rules governing practice, procedure and the conduct of all courts. But this is *not* an absolute grant of power. Some of this power is taken away where

substantive rights are in issue and where operation of the rules deny such rights.

> para. (c), Art 5 Sect. 10: "—if such rules are consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant."

5. The time delay in filing petitioner's brief is waivable even under the Rules. Refer to the "Explanatory note—1979" under Rule 1511 of Rules of Appellate Procedure.

6. There is a statutory right of appeal from an Administrative Agency:

> Title 42 Pa. C.S.A. Sect. 702. "Any person aggrieved by an adjudication of a Commonwealth Agency—shall have the right to appeal therefrom to the court vested with jurisdiction of such appeals—."

The undeserved credence given the PNG witness was gross prejudice. Such unreasoned distinctions injected into agency decisions deny open and equal resolution of grievances. Under such circumstances, the right of appeal is meaningless unless the Commonwealth Court can exercise some modicum of ethical control.

7. Unreasoned distinctions and the exercise of power and authority which the legislature never intended—and never expressly conferred nor implied—has been the hallmark of this case in the PUC. The Amendment I right of the petitioner to petition for a redress of grievance has certainly been abridged—along with other rights—but it is remarkable that the Amendment I abridgment is clearly visible simply by reading the complaint and answer before the PUC and then trying to apply the Order of the PUC.

8. The Order of the PUC affects the petitioner's personal and property rights. This Order also affects the personal and property rights of thousands of PNG's customers. Nowhere does the Administrative Law Judge cite authority for such an Order in the context of the pleadings which he undertook to address. Couple this with the fact that the credibility of the testimony on behalf of The Peoples Natural Gas Company was nil and irrelevant in its effort to uphold what it had alleged in its answer in response to petitioner's complaint.

INCLUSION BY REFERENCE IN THIS MOTION

9. The petitioner hereby includes by reference the allegations of the attached complaint filed by the petitioner in the Federal District Court in Pittsburgh as though such allegations were set out in full herein.

CONCLUSION

10. The abuses of the Pennsylvania Utility Commission reflected by the record in this case should be addressed by the Commonwealth Court in its capacity as monitor of agency action and should, upon its own motion, undertake a study of this particular case before the PUC due to allegations made by the petitioner relating to the hearing of November 5, 1984, that the Gas Company (PNG) witness testified falsely and may come under Title 18 Pa. C.S.A. Sect. 4902 or 4903.

Respectfully submitted,

WILLIAM B. RICHARDSON
149 Westmoreland Avenue
Greensburg, PA 15601

I hereby certify that I am by first class mail postage pre-paid serving a true and correct copy of this MOTION IN OPPOSITION TO DISMISSAL upon the Pennsylvania Public Utility Commission, the Attorney General of Pennsylvania, The Peoples Natural Gas Company, and the United States District Court for the Western District of Pennsylvania on April 8th, 1986, addressed as follows:

GLORIA A. TISCHUK, ESQUIRE
Deputy Attorney General
564 Forbes Avenue
Pittsburgh, PA 15219

Clerk of Court, U.S.
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IN THE

United States District Court

FOR THE

Western District of Pennsylvania

WILLIAM B. RICHARDSON,
Plaintiff

vs

GERALD A. WILSON, Customer's Service Foreman and his employer, PEOPLES NATURAL GAS CO.; JOSEPH FARRELL, Director, Bureau of Consumer Services and his employer, PENNSYLVANIA PUBLIC UTILITY COMMISSION; the Administrative Law Judge, JAMES D. PORTERFIELD; and SARA J. COHICK, Consumer Service Representative.

Civil Action No. 85-2641

COMPLAINT

1. The jurisdictional statutes are Title 28 USCS Sect. 1331 and Title 28 USCS Sect. 1343(1)(2)(3) and relevant Title 42 statutes, if any.

2. The defendants have, purposefully and intentionally and acting under color of law, conspired to manipulate a situation whereby *the plaintiff must*, at his expense, *make alterations in the service line into plaintiff's* house which breaches the original contract, does not enhance the gas

service in anyway, is contrary to law, and has been supported only by invalid evidence including lies, slander and libel.

3. The defendants have, purposefully and intentionally and acting under color of law, conspired to deprive the plaintiff of his constitutional protection against the:

a. right to due process and equal treatment.

b. impairment of contract.

c. right of free association.

d. preservation of property and reputation.

e. Amendment I guarantee against vindictive or unresponsive State action relative to a petition for redress of grievance.

4. The defendant Administrative Law Judge for the Public Utility Commission, purposefully and intentionally and acting under color of law, conspired to deprive the plaintiff of his due process rights by rendering an order following a hearing on November 5th, 1984, in which the plaintiff herein was complainant and the gas company was respondent and which order was *entered in the record beyond the statutory time limit*, it was also unresponsive to the pleadings, unsubstantiated by the evidence, unsupported by subject matter jurisdiction, reflective of an unfair trial, and in violation of the plaintiff's Amendment I right to petition for a redress of grievance.

5. The defendant Administrative Law Judge, purposefully and intentionally and acting under color of law, conspired to deprive the plaintiff of his due process rights by being neither neutral nor detached but displayed bias and prejudice and acted on matters aside from the matters put

in issue by the complaint and answer, treated the gas company as though it was the Amendment I petitioner when such is impossible, instituted "off the record" discussions during the hearing designed to fortify the gas company's case, dismissed the plaintiff's complaint and instituted a judgment order for the gas company in a form of relief for it which was neither set out by way of complaint or in the course of hearing and, in so doing, violated the right of the plaintiff to pre-trial notice required to acquaint him with the issues to be decided.

PRAYER FOR RELIEF

A. That a jury be impaneled to try the cause for damages.

B. That the plaintiff have $10,000.00 compensable damages.

C. That the plaintiff have $10,000.00 punitive damages.

D. That the plaintiff have such other or additional award for his time, costs and expenses associated with the State litigation as well as with this litigation along with such other, additional or alternative relief as may appear to the Court to be equitable.

WILLIAM B. RICHARDSON
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